

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

GALE MATTHEWS-BENSON,

Plaintiff,

ANSWER

Index No.: I-2008-13441

vs.

TOWN OF CHEEKTOWAGA,
CHEEKTOWAGA POLICE DEPARTMENT,
POLICE OFFICER BRIAN R. GRAY

Defendants.

Defendants, Town of Cheektowaga, Cheektowaga Police Department, and Police Officer Brian R. Gray, by their attorneys, Damon & Morey LLP, for their answer to plaintiff's complaint, allege upon information and belief:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 9, and 14 of plaintiff's complaint.
2. These answering defendants admit the allegations contained in paragraphs 2, 3, and 5 of the plaintiff's complaint.
3. Deny the allegations contained in paragraphs 7, 8, 10, 11, 12, 13, and 16 of plaintiff's complaint.
4. The allegations contained in paragraphs 4, 6, and 15 of plaintiff's complaint are legal conclusions of law to which no response is required. If it is determined that a response is required, defendants deny any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph.

5. These answering defendants deny each and every other remaining allegation of plaintiff's complaint not hereinbefore specifically admitted or otherwise denied.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF:

6. Upon the trial of this action it may appear that all or a portion of the plaintiff's claimed injuries and damages were the result of culpable conduct on the part of the plaintiff, and in that event, the plaintiff should be barred from recovery or in the event that the plaintiff is entitled to recovery, the amount of damages otherwise recoverable should be diminished in the proportion which the culpable conduct attributable to the plaintiff bears to the culpable conduct which caused such damages.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF:

7. The acts of others, not under the control of these answering defendants, are the proximate cause of acts alleged by the plaintiff.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF:

8. Plaintiff failed to mitigate her damages.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF:

9. That the complaint fails to state a viable claim against the answering defendants, and therefore should be dismissed as a matter of law.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE,
THE DEFENDANTS ALLEGE UPON INFORMATION AND BELIEF:

10. That defendants Town of Cheektowaga, Cheektowaga Police Department, and Police Officer Brian R. Gray, through their agents and/or employees took actions which were privileged as being judicial, quasi-judicial or discretionary determinations made by such agents

and/or employees while acting in the scope of their duties as public officials and that defendants are, therefore, immune from any liability for such actions.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE,
THE DEFENDANT ALLEGES UPON INFORMATION AND BELIEF:

11. The defendants were at all times acting in good faith in the performance of their duties as employees of the Town of Cheektowaga and they are therefore entitled to qualified immunity.

WHEREFORE, defendants demand judgment as follows:

1. Dismissing the plaintiff's complaint;
2. In the event that plaintiff is entitled to recover, the amount of damages recoverable should be diminished in the proportion which the culpable conduct attributable to the plaintiff, bears to the culpable conduct which caused the damages;

DATED: Buffalo, New York
January 2, 2009

By: s/Marylou K. Roshia

Marylou K. Roshia, Esq.
Damon & Morey LLP
Attorneys for Defendants
Town of Cheektowaga,
Cheektowaga Police Department,
Police Officer Brian R. Gary
1000 Cathedral Place
298 Main Street
Buffalo, New York 14202-4096
Telephone: (716) 856-5500

TO: Michael P. Stuermer, Esq.
LIPSITZ GREEN SCIME CAMBIRA, LLP
Attorneys for Plaintiff
Office and Post Office Address
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
(716) 849-1333